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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/788,795	02/27/2004	Phillip Michael Cook	71622	7350

7590 12/05/2005

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/788,795

Applicant(s)

COOK, PHILLIP MICHAEL

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-41 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lambert et al. (WO 02/076970) in view of Skeffington et al. (2,088,927), Krasavage et al. (J. Agriculture Food Chemistry), Traber et al. and Arago (J. of Pediatric Research).

Lambert et al. disclose a composition containing tocopherol polyethylene glycol succinate (TPGS), which is a water-soluble source of Vitamin E (page 1, lines 5-20). Claims 1-4 differ from the reference in the use of TPGS in a beverage of the claimed composition and in the particular amounts of tocopherol in the beverage. However, Skeffington et al. disclose the use of V-E in aqueous solutions, which can be a beverage containing the claimed water, flavoring agents and sweetener. Krasavage et al. disclose that it is known to use TPGS in an aqueous solution (page 274, 1st incomplete para.) Traber et al. disclose that TPGS can be soluble in water in concentrations up to 20% (page 915, col. 1, 9 lines from the end of the paragraph). The reference discloses that TPGS can be given in therapeutic amounts (entire reference). However, the amounts of tocopherol are known for regular consumption as it is known that tocopherol is a precursor of V-E. Arago discloses that it is known to use therapeutic amounts of TPGS (abstract and page 148, Table 3). Therefore, it would

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have been obvious to use the beverage of Skeffington as the carrier for the TPGS of Lambert et al. because it is known as shown by Krasavage that TPGS can be used in aqueous solutions and it would have been obvious to use less than the therapeutic amounts of Arago for normal consumption and to flavor a beverage to make it more acceptable.

Claim 5 further requires a sweetening agent. Skeffington, discloses sweeteners, and flavors as in claim 6 (page 3, lines 10-35, page 7, lines 20-30). Nothing new is seen in the use of anti-foaming agents, which are used for their known functions. Therefore, it would have been obvious to add beverage ingredients to a solution or liquid to make the composition more acceptable.

Claims 7 and 8 further require ethanol. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33

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C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Nothing new is seen in adding ethanol to beverages as in fruit punches and wine coolers. Therefore, it would have been obvious to add known ingredients to the claimed beverage.

Claim 9 further requires preservatives, claim 10, vitamins or minerals or electrolytes and claim 11 that the beverage is optically clear (page 3, lines 5-11). Preservatives such as sorbates are well known and nothing new is seen in their use or as above in the use of antifoaming agents used for their known functions. Skeffington, discloses that his beverage is optically clear even though it contains fat soluble vitamins (page 3, lines 5-11). Vitamins are disclosed on page 2, lines 10-21. Since the claims require fat-soluble vitamin E, this mixture would also be clear, since the vitamin is soluble in water. Therefore, it would have been obvious to use known ingredients to make a clear beverage.

Claim 12 further requires a fruit juice, or fruit flavoring and tocopheryl in particular amounts. Particular amounts have been disclosed above. Sheffington further requires juice in full strength or cow's milk (claim 38)(page 16, lines 1-11). Therefore, it would have been obvious to use known ingredients in the composition of the combined references to make a beverage containing tocopherol.

The further limitations of claims 13-41 have been disclosed above and are obvious for those reasons.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 11-26-05

H. Pratt
HELEN PRATT
PRIMARY EXAMINER